No. 95-1100

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

THE BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA,

Petitioner,

- against -

JILL BROWN, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR AMICUS CURIAE, THE CITY OF NEW YORK

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STATEMENT OF FACTS

INTEREST OF AMICUS CURIAE

The City of New York ("the City") submits this brief as amicus curiae in support of the position advanced by

petitioner, the Board of the County Commissioners of Bryan County, Oklahoma ("the County"). The City argues that this Court should reverse the judgment of the United States Court of Appeals for the Fifth Circuit, entered October 23, 1995, insofar as that judgment affirmed the imposition of liability upon the County under 42 U.S.C. § 1983. The Court of Appeals held that the County was liable under that statute for a sheriff's solitary action in hiring a reserve deputy sheriff.

The City has a practical interest in the issue of law presented here. The City is a frequent defendant in actions brought pursuant to 42 U.S.C. § 1983. Between 1993 and 1995, inclusive, plaintiffs commenced approximately 550 actions against the City in federal

courts under that statute for alleged constitutional violations by police officers and correction officers. Other such actions were commenced against the City in state court during that time. In those three calendar years, settlements and judgments in federal § 1983 actions involving police officers and correction officers resulted in payouts amounting to approximately $18 million. The parameters of municipal liability under § 1983 have a concrete impact on the public fisc of the City.

The City frequently is a defendant in cases similar to this. A usual claim in police and correction cases against the City is that the City was negligent in hiring, training, or supervising the officer whose behavior is at issue. In New York City, where employing a multi-

cultural police force is an important policy goal, individual hiring decisions should not be considered proof of deliberate indifference amounting to a policy or practice. One isolated decision of a final policymaker is not necessarily a final agency policy or practice. The instant case presents an opportunity for this Court to clarify difficult questions regarding municipal liability for practices or policies which are not in themselves unconstitutional.

ARGUMENT

THE COURT OF APPEALS ERRED IN HOLDING THAT THE COUNTY WAS LIABLE UNDER 42 U.S.C. § 1983 FOR THE SHERIFF'S SINGLE DECISION TO HIRE A RESERVE DEPUTY SHERIFF. THE PLAINTIFFS FAILED TO MAKE A SUFFICIENT SHOWING THAT THE COUNTY HAD BEEN DELIBERATELY INDIFFERENT TO A VIOLATION OF THEIR CONSTITUTIONAL RIGHTS.

The City is confident that the parties to this appeal will brief the issues competently and comprehensively.

The City wishes only to submit its comments on the issue of municipal liability for decisions involving the hiring and training of employees, especially police and correction officers. Without some minimum standards for proof of municipal indifference to constitutional violations, almost all allegations of such indifference will suffice to send a case to the jury. Those minimum standards are already set forth in prior precedents of this Court.

In Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978), this Court held that municipalities are liable under 42 U.S.C. § 1983 for constitutional violations only where "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may

fairly be said to represent official policy, inflicts the injury...." Id. at 694. Municipal liability can be based only on a municipal policy or custom.

This case presents no issue of who is the relevant policymaker. The parties have agreed that "Sheriff Moore was the final policymaker for the Sheriff's Department." Brown v. Bryan County, OK, 67 F.3d 1174, 1182 (5th Cir. 1995).

When a municipal policy or custom is itself unconstitutional, the proof of a case under § 1983 is conceptually direct. Where the policy itself is not unconstitutional, as in this case, proof is necessarily more complicated. All constitutional injuries can be traced back to some municipal policy at some level of abstraction. For instance, the plaintiffs in the instant case would not

have suffered their injury absent the County's policy of maintaining a police force. See City of Oklahoma City v. Tuttle, 471 U.S. 808, 823 (1985)(plurality opinion).

This Court has considered municipal liability arising from a constitutional policy in the context of the training and supervision of police officers. See, e.g., City of Canton, Ohio v. Harris, 489 U.S. 378 (1989). The same principles have been applied in the context of the hiring of police officers. Baker v. Putnal, 75 F.3d 190 (5th Cir. 1996). In Walker v. City of New York, 974 F.2d 293 (2d Cir. 1992), cert. denied, 507 U.S. 961 (1993), the United States Court of Appeals for the Second Circuit accurately observed that the requirement of tracing

constitutional torts to a municipal policy (Id. at 297)

> ... necessarily molds many § 1983 claims against municipalities into "failure to train" or "failure to supervise" claims. It is only by casting claims in this way that plaintiffs can link an actual decision by a high level municipal official to the challenged incident.

An alleged failure to train or supervise an officer can result in municipal liability under § 1983 only if it proceeds from a municipal policy or custom.

In City of Canton, Ohio v. Harris, this Court held that "there are limited circumstances in which an allegation of 'failure to train' can be the basis for liability under § 1983." Id. at 387. This Court further held that "the inadequacy of police training may serve as the basis for § 1983 liability only

where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come in contact." Id. at 388. The instant case presents the issue of how a plaintiff can prove such deliberate indifference.

In Vann v. City of New York, 72 F.3d 1040, 1049 (2d Cir. 1995), the United States Court of Appeals for the Second Circuit addressed the proof of deliberate indifference in the context of claims of inadequate supervision of police:

> To prove such deliberate indifference, the plaintiff must show that the need for more or better supervision to protect against constitutional violations was obvious. [citation omitted] An obvious need may be demonstrated through proof of repeated complaints of civil rights violations; deliberate indifference may be inferred if the complaints are followed by no meaningful attempt on the part of the municipality to investigate or to forestall

> further incidents. [citations omitted] Deliberate indifference may also be shown through expert testimony that a practice condoned by the defendant municipality was "contrary to the practice of most police departments" and was "particularly dangerous" because it presented an unusually high risk that constitutional rights would be violated. [citations omitted]

The Court of Appeals thus accurately noted two different ways of proving a municipality's deliberate indifference to the violation of constitutional rights. One method involves proof of past civil rights complaints. The other method involves proof of an obviously dangerous practice.

The first method of proof is apparently not involved in the instant case. There apparently was no proof of any prior civil rights violations by the County. The Court of Appeals, at any

rate, did not base its decision on such a ground in this case.

The second method of proof was invoked by the Court of Appeals in this case (67 F.3d at 1184-1185):

> We also find the evidence sufficient for a jury to conclude that Sheriff Moore's decision to hire Burns amounted to deliberate indifference to the public's welfare. [citations omitted] In light of the law enforcement duties assigned to deputies, the obvious need for a thorough and good faith investigation of Burns, and the equally obvious fact that inadequate screening of a deputy could likely result in the violation of citizens' constitutional rights, Sheriff Moore can reasonably be said to have acted with deliberate indifference to the public's welfare when he hired Burns. [citation omitted] The failure to conduct a good faith investigation of the prospective employee amounted to Sheriff Moore deliberately closing his eyes to the Burns' background. Such indifferent behavior cannot be tolerated when the prospective applicant

> will be employed in a position of trust and authority.

Although the quoted passage vividly expresses the indignation of the Court of Appeals, it is in error in stating that there was sufficient proof to support a jury finding of deliberate indifference on the part of the County.

The holding of the Court of Appeals is infirm on the factual record. It appears that Deputy Burns had several traffic violations and one misdemeanor conviction arising from a fight with fraternity brothers when he was a teenaged college student. This is not a criminal record which can prove to a rational trier of fact that the Sheriff was deliberately indifferent to a substantial risk that the newly-hired deputy would commit civil rights violations. Even had the Sheriff

obtained the details of Burns' past encounters with the law, nothing there would have indicated that Burns was a poor candidate for deputy sheriff. In essence, there is no causation proven on these facts.

The Court of Appeals erred for a second reason. By enacting a general statute, the legislature of the State of Oklahoma has imposed standards for the hiring of deputy sheriffs. Candidates with felony convictions or convictions for crimes of moral turpitude are disqualified. Candidates must also undergo psychological testing and a police training course. The municipality has discretion to hire candidates with misdemeanor convictions. In this case, the Sheriff complied with state law in hiring the deputy.

The state statute provided guidelines for the hiring of Deputy Burns. The Sheriff followed those guidelines. The Sheriff obtained Burns' criminal record, sent him for psychological testing, and then hired and trained him pursuant to state law. By following state law, the Sheriff acted in a fashion which cannot be considered deliberate indifference for purposes of municipal liability. One cannot charge a municipality with deliberate indifference in being guided by standards adopted by the state legislature. In the small area of discretion exercised by the Sheriff, Deputy Burns' past criminal record was not one which required a refusal to hire. The Court of Appeals erred in holding that the evidence supported the jury verdict to the contrary.

Unless standards of proof are imposed upon the concept of deliberate indifference, claims such as the one presented here will almost always be allowed to go to the jury, where sympathy for an injured plaintiff will often result in municipal liability where there was no deliberate indifference to civil rights violations. Those standards of proof require proof of past violations or the ignoring of an inevitably dangerous situation. Disagreements over discretionary decisions should not amount to proof of deliberate indifference. This Court should clarify the concept of deliberate indifference and how it can be proven. This Court should hold that in order to prove deliberate indifferences that amounts to a policy or practice, a plaintiff must prove more than one

instance of constitutional infraction, combined with no meaningful response by the municipality. If one incident can, by itself, prove deliberate indifference which amounts to a policy or practice, liability on the basis of respondeat superior has been injected into the law of § 1983. This Court should not allow municipal liability to spread beyond the sensible limits set forth in Monell.

CONCLUSION

FOR THE REASONS STATED, THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE REVERSED, AND JUDGMENT SHOULD BE ENTERED ON BEHALF OF THE COUNTY.

Respectfully submitted,

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